IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE

In re

Case No. 02-33163

MARK ALAN SEYMOUR

Debtor

KIMBERLY R. GOODE

Plaintiff and
Counter-Defendant

v. Adv. Proc. No. 02-3186

MARK ALAN SEYMOUR

Defendant and
Counter-Plaintiff

M E M O R A N D U M

APPEARANCES: BAILEY, ROBERTS & BAILEY, PLLC
N. David Roberts, Jr., Esq.
Post Office Box 2189
Knoxville, Tennessee 37901
Attorneys for Plaintiff/Counter-Defendant

JOHN P. NEWTON, JR., ESQ.
Post Office Box 2069
Knoxville, Tennessee 37901
Attorney for Defendant/Counter-Plaintiff

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

This adversary proceeding is before the court upon the Complaint filed by the Plaintiff objecting to the Debtor's discharge. In the alternative, the Debtor seeks a determination that certain debts owed to her by the Debtor are nondischargeable. The Debtor filed a counterclaim against the Plaintiff, seeking damages for an alleged violation of the automatic stay.

The trial was held on November 18, 2003. The record before the court consists of thirty-one exhibits introduced into evidence, along with the testimony of Johnny Lee Cabbage, Ramah Seymour,[1] the Plaintiff, and the Debtor.

This is a core proceeding. 28 U.S.C.A. § 157(b)(2)(C), (I), and (J) (West 1993).

I

On June 17, 2002, the Debtor filed the voluntary petition commencing his bankruptcy case under Chapter 7 of the Bankruptcy Code. The Plaintiff filed the Complaint initiating this adversary proceeding on November 1, 2002. In the Complaint, the Plaintiff objects to the Debtor's discharge under 11 U.S.C.A. §§ 727(a)(2), (3), (4), and/or (5) (West 1993). First, the Plaintiff alleges that the Debtor should be denied his discharge pursuant to § 727(a)(2) for fraudulently transferring a 1999 Yamaha motorcycle to his parents after the filing of his bankruptcy petition. Second, the Plaintiff avers that the Debtor disposed of another motorcycle, jewelry, and other personal items, but that he cannot document or account for these transfers, justifying the denial of his discharge pursuant to both § 727(a)(3) and § 727(a)(5). Third, the

[1] Mrs. Seymour is the Debtor's mother.

Plaintiff argues that the Debtor should not receive his discharge pursuant to § 727(a)(4), because he gave false information at his meeting of creditors, in contradiction to the sworn testimony given by the Debtor and the testimony of his mother at her Bankruptcy Rule 2004 examination. In the alternative, the Plaintiff alleges that the Debtor has not paid obligations incurred in the parties' divorce and that these debts are nondischargeable under 11 U.S.C.A. § 523(a)(15) (West 1993 & Supp. 2003).

The Debtor filed an Answer on December 17, 2002, denying the Plaintiff's claims and asserting a counterclaim against her, based upon a letter that she wrote to his parents after he had filed his bankruptcy petition. The Debtor argues that the letter constitutes an attempt to collect debts by threats and other statements directed to the Debtor's parents and is in direct violation of the automatic stay provisions set forth in 11 U.S.C.A. § 362(a) (West 1993 & Supp. 2003). Furthermore, the Debtor asserts that the Plaintiff's violation was willful, thereby entitling him to damages and attorney fees pursuant to 11 U.S.C.A. § 362(h) (West 1993).

II

The parties were divorced on March 11, 2002, pursuant to a Final Judgment of Divorce (Final Decree) entered in the Chancery Court for Knox County, Tennessee. The Final Decree incorporated the terms of a Marital Dissolution Agreement filed with the Chancery Court on January 7, 2002, and provides for the payment of the parties' marital obligations, in material part, as follows:

> The Wife shall pay the following debts and hold the Husband harmless therefrom: Automobile loan ORNL Federal Credit Union $17,300.00, ORNL Federal Credit

> Union Line of Credit $8,300.00, J.C. Penny Credit Card . . . $259.10, Victoria's Secret Credit Card . . . $27.98, Sears Premier Card . . . $305.93, and all other debts in her name.
>
> The Husband shall pay the following debts and hold the Wife harmless therefrom: Sears Gold Mastercard . . . $1,499.02, MBNA America Credit Card . . . $1,983.29, FNANB Credit Card . . . $1,239.40, Citi Platinum Select Card . . . $10,260.66, First Card Credit Card . . . $5,489.44, ORNL Federal Credit Union Motorcycle Loan $5,600.00, and all other debts in his name [the Marital Obligations].

TRIAL EX. 6. This division left each party with approximately $26,000.00, or one-half, of the combined marital debt. The Marital Obligations were listed in the Debtor's statements and schedules as nonpriority unsecured debts.

III

Chapter 7 debtors receive a general discharge of all prepetition debts under 11 U.S.C.A. § 727, unless one of ten express limitations exists. As material to this adversary proceeding, § 727 provides:

> (a) The court shall grant the debtor a discharge, unless—
>
> . . . .
>
> (2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed—
>
> (A) property of the debtor, within one year before the date of the filing of the petition; or
>
> (B) property of the estate, after the date of the filing of the petition;
>
> (3) the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents,

> records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case;
>
> (4) the debtor knowingly and fraudulently, in or in connection with the case—
>
> (A) made a false oath or account;
>
> . . . .
>
> (5) the debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities[.]
>
> . . . .
>
> (b) Except as provided in section 523 of this title, a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for relief under this chapter . . . .
>
> (c)(1) The trustee, a creditor, or the United States trustee may object to the granting of a discharge under subsection (a) of this section.

11 U.S.C.A. § 727 (West 1993). These limitations furnish creditors with "a vehicle under which *abusive* debtor conduct can be dealt with by denial of discharge." *Blockman v. Becker (In re Becker)*, 74 B.R. 233, 236 (Bankr. E.D. Tenn. 1987) (quoting *Harman v. Brown* (*In re Brown)*, 56 B.R. 63, 66 (Bankr. D.N.H. 1985)). Section 727(a) is liberally construed in favor of the debtor, and the party objecting to discharge bears the burden of proof by a preponderance of the evidence. *Keeney v. Smith (In re Keeney)*, 227 F.3d 679, 683 (6th Cir. 2000); *Barclays/Am. Bus. Credit, Inc. v. Adams (In re Adams)*, 31 F.3d 389, 393 (6th Cir. 1994); FED. R. BANKR. P. 4005.

A

The Plaintiff first objects to discharge under § 727(a)(2)(A), consisting of the following two elements: "1) a disposition of property [including transfer or] concealment, and 2) 'a subjective intent on the debtor's part to hinder, delay, or defraud a creditor through the act disposing of the property.'" *Keeney*, 227 F.3d at 683 (quoting *Hughes v. Lawson (In re Lawson)*, 122 F.3d 1237, 1240 (9th Cir. 1997)). The party objecting to discharge must prove that the debtor possessed an actual, not constructive, intent to deceive. *Hunter v. Sowers (In re Sowers)*, 229 B.R. 151, 157 (Bankr. N.D. Ohio 1998). Because it is inherently difficult to prove another's intentions, the Plaintiff may use circumstantial evidence, including evidence of the Debtor's conduct, to establish his actual intent, and "[j]ust one wrongful act may be sufficient to show actual intent . . . [although] a continuing pattern of wrongful behavior is a stronger indication [thereof]." *Sowers*, 229 B.R. at 157. Additionally, it is not necessary for a plaintiff to prove that a debtor intended to hinder, delay, and defraud creditors, as proof of any one satisfies § 727(a)(2)(A). *Cuervo v. Snell (In re Snell)*, 240 B.R. 728, 730 (Bankr. S.D. Ohio 1999).

The Plaintiff first objects to the Debtor's discharge based upon the prepetition transfer of a 1999 Yamaha motorcycle (Motorcycle). The Debtor purchased the Motorcycle in January 1999 for approximately $10,500.00.[2] At the time the parties executed their Marital Dissolution Agreement in December 2001, the outstanding balance on the Motorcycle was approximately $5,600.00. *See* TRIAL EX. 6. On February 27, 2002, the Debtor's mother gave the Debtor a

[2] At his meeting of creditors on July 23, 2002, the Debtor testified that he purchased the Motorcycle for $9,900.00, but in his deposition taken on October 16, 2002, he testified that he paid $11,000.00 for the Motorcycle. *Compare* TRIAL EX. 25 at p.4 *with* TRIAL EX. 26 at p.35, line 16.

check payable to "ORLN [sic] Fed. Credit Union" in the amount of $5,406.69, for the purpose of paying off the loan on the Motorcycle. TRIAL EX. 18. Mrs. Seymour testified that she gave the check to the Debtor for delivery to ORNL Federal Credit Union (the Credit Union) and that the Debtor was then going to make payments to reimburse his parents for paying off the loan. However, the parties did not execute any sort of note for repayment, and both Mrs. Seymour and the Debtor confirmed that after the loan was paid off, the Debtor only made one $130.00 payment to his mother on March 1, 2002. *See also* TRIAL EX. 16.

The Credit Union was unable to produce the title to the Motorcycle after the loan was paid in full, and the Debtor then ordered a new title, which was issued by the State of Tennessee on May 14, 2002, and showed the Debtor as the registered owner of the Motorcycle. *See* TRIAL EX. 27. After receiving the duplicate title, the Debtor endorsed the back in blank, granting an assignment or transfer of the title to an unnamed transferee as of February 27, 2002, for the amount of $5,406.69. *See* TRIAL EX. 15; TRIAL EX. 27. Mrs. Seymour testified that she has not applied for a title to the Motorcycle and that neither she nor her husband[3] are listed as owners or lienholders on the title with the State of Tennessee.

The Plaintiff argued that the Debtor transferred the Motorcycle in order to hinder, delay, or defraud his creditors, namely the Plaintiff. However, the Plaintiff has not offered sufficient proof to evidence that the Debtor possessed the requisite fraudulent intent to conceal, with regards to his bankruptcy filing. The Plaintiff offered into evidence the testimony of Johnny Lee Cabbage,

[3] The Debtor's father, Roy Seymour, died on December 1, 2002.

an acquaintance of the Debtor, who testified that the Debtor inquired as to whether he could leave the Motorcycle at Mr. Cabbage's auto shop, but Mr. Cabbage denied the Debtor's request. However, Mr. Cabbage also testified that this request occurred while the Plaintiff and the Debtor were still married, prior to their divorce in December 2001, and more than six months prior to his filing for bankruptcy.

Based upon the evidence presented, the Plaintiff has not met her burden of proof that the Debtor attempted to conceal property with an actual intent to hinder, delay, or defraud his creditors.

B

The Plaintiff also objects to the Debtor's discharge under § 727(a)(2)(B). Whereas § 727(a)(2)(A) encompasses a debtor's prepetition acts, a debtor's postpetition actions fall within the scope of § 727(a)(2)(B), which requires proof that "(1) the debtor transferred or concealed property, (2) such property constituted property of the estate, (3) the transfer or concealment occurred after the filing of the bankruptcy petition, and (4) the transfer or concealment was made with the intent to defraud the bankruptcy trustee." *Sowers*, 229 B.R. at 156. Once a creditor establishes its case, the burden shifts to the debtor to provide the court with a convincing explanation for the concealment. *Royer v. Smith (In re Smith)*, 278 B.R. 253, 257 (Bankr. M.D. Ga. 2001). As with § 727(a)(2)(A), intent under § 727(a)(2)(B) may be established by evidence of a debtor's conduct. *Sowers*, 229 B.R. at 157.

The Plaintiff has offered no proof of any postpetition transfer of property by the Debtor to any party, and once again, she has not met her burden of proof necessary to deny the Debtor's discharge under § 727(a)(2)(B).

C

Next, the Plaintiff objects to the Debtor's discharge under § 727(a)(3), which requires that a debtor produce documentation "with enough information to ascertain [his] financial condition and track his financial dealings with substantial accuracy for a reasonable period past to present." *Wazeter v. Mich. Nat'l Bank (In re Wazeter)*, 209 B.R. 222, 227 (W.D. Mich. 1997) (quoting *In re Juzwiak*, 89 F.3d 424, 427 (7th Cir. 1996) (citations omitted)). This disclosure provides the trustee and creditors with "complete and accurate information concerning the status of [a debtor's] affairs and financial history." *Wazeter*, 209 B.R. at 227. The Plaintiff is not responsible for investigating and acquiring documents; instead, the Debtor bears the burden of producing adequate and sufficient records. *Wazeter*, 209 B.R. at 227-28 (citing *Juzwiak*, 89 F.3d at 428). On the other hand, even though creditors "[are] not required to sift through voluminous documents, or to indulge in speculation about where the spent funds are, . . . [they are], however, burdened with proving the debtor's financial position *cannot* be ascertained." *Becker*, 74 B.R. at 237.

Adequacy of records is determined on a case by case basis. *Turoczy Bonding Co. v. Strbac (In re Strbac)*, 235 B.R. 880, 882 (B.A.P. 6th Cir. 1999). Consequently, judges have broad discretion to deny a discharge based on an inadequacy in the keeping of books and records. *Dolin v. N. Petrochemical Co. (In re Dolin)*, 799 F.2d 251, 253 (6th Cir. 1986). A debtor's records

should be measured "against the type of books and records kept by a reasonably prudent debtor with the same occupation, financial structure, education, and experience." *Wazeter*, 209 B.R. at 227 (quoting *Wynn v. Wynn (In re Wynn)*, 205 B.R. 97, 101 (Bankr. N.D. Ohio 1997)). Examples of inadequate disclosures include production of withdrawal records without indicating the disposition of funds, failure to produce checking account statements, failure to provide any household bills, and failure to account for dissemination of assets or to estimate income. *See Dolin*, 799 F.2d at 253; *Strbac*, 235 B.R. at 884; *Wazeter*, 209 B.R. at 228; *Calisoff v. Calisoff (In re Calisoff)*, 92 B.R. 346, 356 (Bankr. N.D. Ill. 1988). As with § 727(a)(2)(A), the Plaintiff must first meet her burden of proof that the Debtor's records are inadequate, then the burden shifts to the Debtor to prove that his failure to maintain records was justified under the specific circumstances of his case. *Strbac*, 235 B.R. at 883; *Wazeter*, 209 B.R. at 227. Intent is not an issue under § 727(a)(3). *Wazeter*, 209 B.R. at 227.

The Plaintiff argued that the Debtor has not kept or produced adequate financial records, relying upon cash payments for both personal and business transactions, and not keeping receipts from these transactions. Financial records supplied by the Debtor to the Chapter 7 Trustee following his meeting of creditors were introduced into evidence. *See* TRIAL EX. 16. These records, which were requested by the Trustee at the Debtor's meeting of creditors on July 23, 2002, were supplied to the Trustee on August 2, 2002, and consisted of a copy of the Debtor's checkbook register from December 27, 2001, to July 1, 2002, in addition to copies of the Debtor's

bank statements for December 2001, February 2002, March 2002, and April 2002.[4] At trial, the Debtor testified that this has always been the way in which he has kept his financial records, by comparing the statements with his checkbook register. Additionally, he testified that the Credit Union, where he maintains his checking account, does not supply copies of checks written. This testimony was not refuted. Finally, the Debtor testified that he keeps receipts from cash transactions for a few months, but then he throws them away. Again, there was no proof offered by the Plaintiff to rebut this testimony.

In making its determination under § 727(a)(3), the court is required to measure the Debtor's record-keeping methods, or lack thereof, against those of "a reasonably prudent debtor with the same occupation, financial structure, education, and experience." *Wazeter*, 209 B.R. at 227. In doing so, the court recognizes that the Debtor is not a sophisticated businessman, and in fact, the proof evidences that the Debtor is not adept with handling his finances in general. It is also clear that the Debtor is not particularly organized. The court also recognizes that the Debtor produced all documents requested by the Chapter 7 Trustee within ten days of the Trustee's request.

The Bankruptcy Code does not require records to be maintained in any particular form, and incomplete and/or unorganized records will not bar a debtor's discharge if his financial condition can nevertheless be ascertained. *Becker*, 74 B.R. at 236-37. In *Becker*, the debtor did not keep books, records, or a checking account; however, he did tender to the trustee at his meeting of

[4] There was no bank statement included within Trial Exhibit 16 for January 2002, and its absence was not addressed at trial by either party.

creditors a box containing invoices, receipts, bills, legal documents, and bank statements, and he later obtained and submitted copies of his cancelled checks, which he and his accountant used to create a spreadsheet showing the course of his business dealings as best his memory and the documents provided. *Becker*, 74 B.R. at 235. The court held that even though the debtor's records were "poor at best and lack some receipts for cash expenditures and the like, the debtor's testimony and available records establish a satisfactory explanation of his business affairs to enable his creditors to ascertain his financial condition." *Becker*, 74 B.R. at 237.

Here, the Debtor has provided sufficient documentation by which his creditors may ascertain his true financial condition. The court accordingly finds that the Plaintiff has not met her burden of proof that the Debtor did not produce adequate documentation by which his financial condition could be ascertained. The court will not deny the Debtor's discharge pursuant to § 727(a)(3).

D

To satisfy § 727(a)(4)(A), the objecting party must prove: (1) that the debtor made a statement while under oath; (2) that was false; (3) that the debtor knew that the statement was false when making it; (4) that the debtor had fraudulent intent when making the statement; and (5) the statement materially related to the bankruptcy case. 11 U.S.C.A. § 727(a)(4)(A); *Keeney*, 227 F.3d at 685; *Hendon v. Oody (In re Oody)*, 249 B.R. 482, 487 (Bankr. E.D. Tenn. 2000).

A debtor's statements and schedules are executed under oath and penalty of perjury. FED. R. BANKR. P. 1008; OFFICIAL FORM 1 (Voluntary Petition); OFFICIAL FORM 7 (Statement of

Financial Affairs); *Hamo v. Wilson (In re Hamo)*, 233 B.R. 718, 725 (B.A.P. 6th Cir. 1999); *see also Beaubouef v. Beaubouef* (*In re Beaubouef)*, 966 F.2d 174, 178 (5th Cir. 1992). Statements made by a debtor at the meeting of creditors pursuant to 11 U.S.C.A. § 341 (West 1993 & Supp. 2002) are made under oath. *See* 11 U.S.C.A. § 343 (West 1993) ("The debtor shall appear and submit to examination under oath at the meeting of creditors under section 341(a) of this title . . . ."); FED. R. BANKR. P. 2003(c). Similarly, testimony and statements given in a deposition, *see, e.g., Brumley v. Wingard*, 269 F.3d 629, 642 (6th Cir. 2001), and at trial, *see, e.g., Workman v. Bell*, 227 F.3d 331, 341 (6th Cir. 2000), are under oath.

A debtor's knowledge that a statement is false can be evidenced by a demonstration that the debtor "knew the truth, but nonetheless failed to give the information or gave contradictory information." *Hamo*, 233 B.R. at 725; *Sowers*, 229 B.R. at 158 (citing *Pigott v. Cline (In re Cline)*, 48 B.R. 581, 584 (Bankr. E.D. Tenn. 1985)). Fraudulent intent "involves a material representation that [the debtor knows] to be false, or . . . an omission that [the debtor knows] will create an erroneous impression." *Keeney*, 227 F.3d at 685 (quoting *In re Chavin*, 150 F.3d 726, 728 (7th Cir. 1998)). Reckless disregard or indifference for the truth also demonstrates fraudulent intent. *Keeney*, 227 F.3d at 686; *Beaubouef*, 966 F.2d at 178. Intent may be inferred from the debtor's conduct, and a continuing pattern of omissions and/or false statements in the debtor's bankruptcy schedules exhibits reckless indifference. *Hamo*, 233 B.R. at 724-25; *Sowers*, 229 B.R. at 159. On the other hand, a debtor who mistakenly or inadvertently gives false information does not possess the requisite intent to satisfy § 727(a)(4). *Keeney*, 227 F.3d at 686; *Hamo*, 233 B.R. at 725. Generally, if a debtor amends his statements and schedules and/or reports omissions

or misstatements prior to or during the meeting of creditors, courts do not find fraudulent intent. *Gold v. Guttman (In re Guttman)*, 237 B.R. 643, 647 (Bankr. E.D. Mich. 1999).

Statements are material for the purposes of § 727(a)(4)(A) if they "bear[] a relationship to the [debtor's] business transactions or estate, or concern[] the discovery of assets, business dealings, or the existence and disposition of property." *Keeney*, 227 F.3d at 686 (quoting *Beaubouef*, 966 F.2d at 178). Likewise, a claim is material if it hinders the administration of the [bankruptcy] estate." *Calisoff*, 92 B.R. at 355.

Here, the Plaintiff objects to the Debtor's discharge under § 727(a)(4)(A) first on the basis that he filed statements and schedules that were materially inaccurate and/or false, with creditors intentionally omitted, and that he has failed to amend those statements and schedules. Also, the Plaintiff grounds her objection to the Debtor's discharge on her contention that he gave materially misleading testimony at his meeting of creditors, in direct contradiction to testimony given by the Debtor in two depositions and at trial, and contrary to testimony given by his mother in her Bankruptcy Rule 2004 examination. In response, the Debtor testified that he did not purposely file statements and schedules that were incorrect. He also testified that the information he gave at his meeting of creditors was not intentionally false or misleading, but was based upon assumptions and knowledge that he had at that time. All matters central to resolution of this issue revolve around the Motorcycle, the Debtor's transfer thereto to his parents, his subsequent failure to list his parents as creditors, the Debtor's continuous possession of the Motorcycle, and finally, his false testimony to the contrary.

The Debtor filed for Chapter 7 bankruptcy on June 17, 2002. His parents are not listed as creditors on Schedule D (Secured Creditors), Schedule E (Unsecured Priority Creditors), or Schedule F (Unsecured Nonpriority Creditors). However, on his Statement of Financial Affairs, at section 3, entitled "Payments to creditors," the Debtor lists his father, evidencing two prepetition obligations with payments thereon as follows:

Dates of Payments	Amount Paid	Amount Still Owing
2/2002	100.00	5,500.00
He has not paid anything yet	0.00	750.00[5]

TRIAL EX. 1.

On that same page, section 5, entitled "Repossessions, foreclosures and returns," appears and instructs individual debtors to "[l]ist all property that has been repossessed by a creditor, sold at foreclosure sale, transferred through a deed in lieu of foreclosure or returned to the seller, within one year immediately preceding the commencement of this case." TRIAL EX. 1. Under this section, the Debtor disclosed the following:

Name and address of creditor or seller	Date of repossession, foreclosure sale transfer or return	Description and value of property
Roy E. Seymour 4405 Fringe Tree Drive Knoxville, TN 37938	06/02/2002	1999 Yamaha Roadstar 1600 $5600.00

TRIAL EX. 1.

[5] This amount represents the payment on June 6, 2002, by the Debtor's parents to his bankruptcy attorney.

Similarly, under section 10 of his Statement of Financial Affairs entitled "Other transfers," in which the Debtor was required to "[l]ist all other property, other than property transferred in the ordinary course of business or financial affairs of the debtor, transferred either absolutely or as security within one year immediately preceding the commencement of this case[,]" the Debtor again listed the Motorcycle, with the following descriptions:

Name and address of transferee, Relationship to Debtor	Date	Describe property transferred and value received
Roy E. Seymour 4405 Fringe Tree Dr. Knoxville, TN 37938 Father	01/13/2002	1999 Yamaha Roadstar 1600 Father paid off debt $5600.00, Debtor owes the father $5600.00.

TRIAL EX. 1.

Finally, at the bottom of this page of the Statement of Financial Affairs, at section 14 entitled "Property held for another person" which directs the Debtor to "[l]ist all property owned by another person that the debtor holds or controls," the Debtor answered "None." TRIAL EX. 1.

At the Debtor's meeting of creditors, held on July 23, 2002, the Chapter 7 Trustee, William T. Hendon, questioned the Debtor, under oath, concerning his assets, liabilities, and the statements and schedules he filed to commence his Chapter 7 bankruptcy case. With respect to the Motorcycle, the following testimony ensued:

Q: Did your father repossess a 1999 Yamaha?
A: Yes sir.
Q: In June?

A: Yes sir.
Q: Do you have the title?
A: No, the bank has the title and I'm guessing he paid it off. . . .
Q: He paid it off?
A: Yes sir. It was a loan in against me, in my name and he paid it off. . . . I owe him the money.
Q: Who's got the Yamaha now?
A: He does.
Q: You keep it at your house?
A: No sir.

TRIAL EX. 25.

During questioning by creditors, however, the Debtor testified as follows concerning the Motorcycle:

Q: Have you had possession of the Yamaha motorcycle since your father paid it off?
A: Um, yes sir.
Q: How long exactly have you had possession?
A: Since June 10th.
Q: You did not take possession of it until June 10th?
A: Yes sir.
Q: Where is it located now?
A: I don't know.
. . . .
Q: And who has the motorcycle now?
A: I don't know.
Q: Is it at your father's?
A: I don't know.
. . . .
Q: Who owns the motorcycle today, you or your father?
A: I don't know.

TRIAL EX. 25. With regards to the preparation of his statements and schedules, the Debtor stated that he supplied his attorney with the information necessary to prepare the documents, that he reviewed the statements and schedules prior to signing them on June 13, 2002, and that he has not filed any amendments thereto. *See* TRIAL EX. 26, p. 51, line 24 through p. 52, line 20. The

Debtor also testified at trial that his parents were present with him at his attorney's office when his bankruptcy statements and schedules were prepared.

In his October 16, 2002 deposition, the Debtor was repeatedly asked about the Motorcycle, the transaction with his father, and the location of the Motorcycle. The Debtor acknowledged that the Motorcycle was located at his home address, but insisted that it was his father's home. *See* TRIAL EX. 26, p. 44, line 21 through p. 45, line 7. Moreover, the Debtor admitted that his parents had never ridden the Motorcycle and that he, alone, was the only person to ever use the Motorcycle. TRIAL EX. 26, p. 46, lines 10 through 14.

At trial, the Debtor testified that his parents never took possession of the Motorcycle. When asked about the contrary testimony given at his meeting of creditors, the Debtor testified that he told the Trustee that his father had repossessed the Motorcycle because his father had threatened to take the Motorcycle but never had. Additionally, Mrs. Seymour testified that at all times, the Motorcycle has been in the Debtor's possession, and he has had free use of the Motorcycle. She further testified that the Motorcycle has never been at her house and that neither she nor the Debtor's father had ever intended to use the Motorcycle themselves, but that she had paid off the Debtor's loan only for the Debtor's benefit.

The court finds that the Debtor's discharge should be denied pursuant to § 727(a)(4)(A). First, the Debtor submitted false and/or misleading statements and schedules. The Debtor failed to list his parents as creditors on either Schedule D, Schedule E, or Schedule F. While the court recognizes that the Debtor did list the transfer or assignment of the Motorcycle to his father in his

Statement of Financial Affairs, listing a creditor on the Statement of Financial Affairs does not constitute disclosure and does not allow for proper notice to creditors. Moreover, it is undisputed that the Statement of Financial Affairs contains materially false statements regarding the repossession of the Motorcycle by the Debtor's father. Additionally, the Statement of Financial Affairs indicates that the Debtor transferred the Motorcycle to his father, but it does not disclose that the Debtor, alone, was the only party who ever had actual possession of the Motorcycle. Finally, the amount of the debt owed, as well as the date and amount of the single payment made thereon, were all incorrectly stated. The falsity of these listings was brought to the Debtor's attention, beginning at the meeting of creditors, and he has had ample opportunity to amend his schedules to cure the misstatements, but he has chosen not to do so.

Those misstatements are sufficient, in and of themselves, to deny the Debtor's discharge; however, when coupled with the Debtor's false testimony at his meeting of creditors, clearly, the Debtor is not entitled to receive a discharge. The Debtor expressly stated at his meeting of creditors that his father had repossessed the Motorcycle and that it was in his father's possession in July 2002. However, at that same meeting of creditors, when questioned by the Plaintiff's attorney regarding the alleged repossession, the Debtor admitted that he had taken possession of the Motorcycle on June 10, 2002, but even so, he did not know where it was located on July 23, 2002. In direct contradiction to this testimony is the testimony at trial of the Debtor's mother who stated that the Motorcycle has never been located at her house, that it has always been in the Debtor's possession, and that they did not at any time repossess the Motorcycle. At trial, the Debtor also admitted that his parents never took possession of the Motorcycle, never repossessed

the Motorcycle, and never used it. Taking all of the evidence together, the court finds that the Debtor intentionally made false statements, under oath, both in his statements and schedules and at his meeting of creditors. Accordingly, the Debtor's discharge shall be denied under § 727(a)(4)(A).

E

Finally, the Plaintiff objects to the Debtor's discharge under § 727(a)(5), alleging that he has not adequately explained a loss or deficiency of assets. The court has "broad power [under § 727(a)(5)] to decline to grant a discharge . . . where the debtor does not adequately explain a shortage, loss, or disappearance of assets." *In re D'Agnese*, 86 F.3d 732, 734 (7th Cir. 1996). The initial burden is on the Plaintiff to establish the loss or deficiency of assets by demonstrating that (1) at a time not too remote from the bankruptcy, the Debtor owned identifiable assets; (2) on the day that he commenced his bankruptcy case, the Debtor no longer owned the particular assets in question; and (3) his schedules and/or the pleadings in the bankruptcy case do not offer an adequate explanation for the disposition of the assets in question. *Schilling v. O'Bryan (In re O'Bryan)*, 246 B.R. 271, 279 (Bankr. W.D. Ky. 1999); *see also Ernst v. Walton (In re Walton)*, 103 B.R. 151, 155 (Bankr. W.D. Ohio 1989) (A creditor establishes a prima facie case by showing that "[the] debtor has listed assets in his schedules at a lower figure than he has previously presented himself to be worth, or where there was an unusual and unexplained disappearance of assets shortly before the debtor filed bankruptcy.") (internal citations omitted). The Plaintiff is not required to prove that the Debtor acted knowingly or fraudulently. *Walton*, 103 B.R. at 155.

The burden then shifts to the Debtor to provide a satisfactory explanation of the whereabouts of the assets. *Chalik v. Moorefield (In re Chalik)*, 748 F.2d 616, 619 (11th Cir. 1984). "[A] satisfactory explanation 'must consist of more than . . . vague, indefinite, and uncorroborated' assertions by the debtor." *D'Agnese*, 86 F.3d at 734 (quoting *Baum v. Earl Millikin, Inc. (In re Baum)*, 359 F.2d 811, 814 (7th Cir. 1966)). The explanation must be reasonable and credible, such that the court is convinced that the Debtor is acting in good faith. *Fed. Deposit Ins. Corp. v. Hendren (In re Hendren)*, 51 B.R. 781, 788 (Bankr. E.D. Tenn. 1985). Furthermore, the explanation must be supported by "at least some documentation . . . [that is] sufficient to 'eliminate the need for the Court to speculate as to what happened to all the assets.'" *Stathopoulos v. Bostrom (In re Bostrom)*, 286 B.R. 352, 364-65 (Bankr. N.D. Ill. 2002) (quoting *Banner Oil Co. v. Bryson (In re Bryson)*, 187 B.R. 939, 956 (Bankr. N.D. Ill. 1995)).

The Plaintiff bases her objection to the Debtor's discharge under § 727(a)(5) on allegations that the Debtor failed to account for his wedding ring and a gun that he admittedly pawned. However, other than the Debtor's testimony that he did, in fact, pawn these items and did not maintain records from the pawn shop, the Plaintiff offered no proof as to when the items were pawned or the value of these assets. Standing alone, the Plaintiff has not offered sufficient evidence to justify denial of his discharge. Nevertheless, the court does recognize that the Debtor's failure to disclose the transfer of these assets in his statements and schedules further buttresses the denial of his discharge under § 727(a)(4).

V

Having found cause to deny the Debtor's discharge under § 727(a)(4), the court need not address the Plaintiff's § 523(a)(15) dischargeability argument.

VI

The final issue before the court is the Debtor's counterclaim against the Plaintiff for violation of the automatic stay. The Debtor contends that the Plaintiff violated the stay when she sent a letter to his parents shortly after the Debtor commenced his bankruptcy case, in an alleged attempt to coerce the Debtor to pay his debts, and thus, she willfully violated the automatic stay.

The commencement of a debtor's bankruptcy case triggers the protection of the automatic stay provisions of § 362(a), which states, in pertinent part:

> (a) Except as provided in subsection (b) of this section, a petition filed under section 301 . . . operates as a stay, applicable to all entities, of—
>
> . . . .
>
> (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title[.]

11 U.S.C.A. § 362 (West 1993 & Supp. 2003). The automatic stay provides debtors with "'a breathing spell' from collection efforts and [] shield[s] individual creditors from the effects of a 'race to the courthouse,' thereby promoting the equal treatment of creditors." *In re Printup*, 264 B.R. 169, 173 (Bankr. E.D. Tenn. 2001). Actions taken in violation of the automatic stay are "invalid and voidable and shall be voided absent limited equitable circumstances." *Easley v. Pettibone Mich. Corp.*, 990 F.2d 905, 911 (6th Cir. 1993). "A violation is willful if 'the creditor

deliberately carried out the prohibited act with knowledge of the debtor's bankruptcy case.'" *Printup*, 264 B.R. at 173.

> A specific intent to violate the stay is not required, or even an awareness by the creditor that her conduct violates the stay. It is sufficient that the creditor knows of the bankruptcy and engages in deliberate conduct that, it so happens, is a violation of the stay. Moreover, where there is actual notice of the bankruptcy it must be presumed that the violation was deliberate or intentional.
>
> Satisfying these requirements itself creates strict liability. There is nothing more to prove except damages.

Printup, 264 B.R. at 173; *see also In re Dunning*, 269 B.R. 357, 362 (Bankr. N.D. Ohio 2001) (a willful violation of the automatic stay does not require a specific intent to violate the stay).

If the court determines that a willful violation occurred, § 362(h) mandates an award of actual damages, including costs and attorney fees, and allows for punitive damages in appropriate circumstances. *See* 11 U.S.C.A. § 362(h) (West 1993). "Punitive damages are appropriate to deter a pattern of behavior that ignores the automatic stay." *In re Kortz*, 283 B.R. 706, 713 (Bankr. N.D. Ohio 2002). Additionally, "[i]f the bankruptcy court believes that the amount of such actual damages is insufficient to deter the kind of deliberate and repeated violations of the automatic stay which evident in this case, the bankruptcy court is free to impose an appropriate amount of punitive damages." *Dunning*, 269 B.R. at 363 (quoting *Archer v. Macomb County Bank*, 853 F.2d 497, 500 (6th Cir. 1998)). In determining whether punitive damages are appropriate, the court should consider (1) the nature of the creditor's conduct; (2) whether the creditor has the ability to pay damages; (3) the creditor's motives in violating the stay; and (4) whether there was any provocation by the debtor. *In re Johnson*, 253 B.R. 857, 862 (Bankr. S.D. Ohio 2000).

The letter in question was written to the Debtor's parents by the Plaintiff sometime between the commencement of his Chapter 7 bankruptcy case on June 17, 2002, and the meeting of creditors on July 23, 2002; however, neither the Plaintiff nor Mrs. Seymour could supply an actual date. The letter states, in part:

> I understand that you didn't want to help Mark get out of the debts he's accumulated. But it seems now that you only refuse to help him do the Christian thing, which would be to find a way to pay what he honestly owes. But you are obviously quite willing to help him do the wrong thing, which is to rob me of $20,000.
>
> I see on the bankruptcy papers that you paid off his [the Debtor's] motorcycle and you are paying for his bankruptcy lawyer. Well, get your wallet out, Dad, because I plan to go all the way with this. I'll be damned if I'll let Mark rob me of all that money. He has already robbed me of so much.
>
> . . . .
>
> I just couldn't go any longer without speaking up to tell you how terribly disappointed I am in you. No wonder your kids can't handle any responsibility, and are willing to do whatever it takes to get what they want.

TRIAL EX. 24.

The Debtor argues that the foregoing portions of the letter constitute a threat in order to coerce him to pay the Marital Obligations. The court disagrees. The letter is addressed to the Debtor's parents, at their home address. It does not ask them to relay any messages to the Debtor, nor does it make any outright demand for payment from the Debtor or his parents. When asked about the statement to "get out your wallet," the Plaintiff explained, to the court's satisfaction, that she was angry when she wrote the letter, and that she was referring to the current court proceeding

that she has pursued. The Plaintiff's letter to the Debtor's parents does not violate the automatic stay, and thus, the Debtor is not entitled to any damages therefor.

A judgment consistent with this Memorandum will be entered.

FILED: December 3, 2003

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE

In re

Case No. 02-33163

MARK ALAN SEYMOUR

Debtor

KIMBERLY R. GOODE

Plaintiff and
Counter-Defendant

v. Adv. Proc. No. 02-3186

MARK ALAN SEYMOUR

Defendant and
Counter-Plaintiff

J U D G M E N T

For the reasons stated in the Memorandum filed this date containing findings of fact and conclusions of law as required by Rule 52(a) of the Federal Rules of Civil Procedure, made applicable to this adversary proceeding by Rule 7052 of the Federal Rules of Bankruptcy Procedure, it is ORDERED, ADJUDGED, and DECREED as follows:

1. The Plaintiff's Complaint filed November 1, 2002, objecting to the Defendant's discharge, is SUSTAINED. The Defendant's discharge is DENIED under 11 U.S.C.A. § 727(a)(4)(A) (West 1993).

2. The Defendant's Counterclaim filed with his Answer on December 17, 2002, requesting damages under 11 U.S.C.A. § 362(h) (West 1993) for the Plaintiff's alleged violation of the automatic stay, is DISMISSED.

ENTER: December 3, 2003

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE